Supreme Court, U.S.
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No. 94-13

In The

Supreme Court of the United States

October Term, 1994

DEPARTMENT OF CORRECTIONS OF THE STATE OF KANSAS,

Petitioner,

v.

ALBERT L. BRINKMAN, PAMELA N. BRINKMAN, LUTHER BLANTON JR., EARL A. COLVER, III, DAVID R. EDMONDS, LARRY L. GIRARD, ARTHUR T. GREEN, LAWRENCE HENDERSON, THOMAS E. HUNT, JR., ROBERT P. KULT, STEVEN MARTIN, JON O. MCCLENDON, RUTH I. MILLER, STEPHANIE PENROD, VINCENT REED, PATRICK SIMPSON, MARGARET A. SWOPE, BILLIE JOE BUCHANAN, WILLIAM A. GAMBREL, BARBARA J. KESINGER, HERBERT DEAN WOLFE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

The respondents, Albert L. Brinkman, et al., appearing by counsel, Brad E. Avery, hereby enter into opposition to the Petition of the Department of Corrections of the State of Kansas for Writ of Certiorari to review of the opinion of the United States Court of Appeals for the 10th

Circuit, no. 93-3019 and the United States District Court for the District of Kansas, no. 91-4208-SAC.

STATUTES AT ISSUE

Respondents incorporate those statutes and constitutional provisions named by the petitioner, except that petitioner wrongly attributed provisions of 29 U.S.C. 201, et seq. to title 28 of the United States Code, including 29 U.S.C. 203(c), 29 U.S.C. 203(d), 29 U.S.C. 203(e)(2)(C), 29 U.S.C. 203(s)(1)(B), (C), 29 U.S.C. 203(x), 29 U.S.C. 206(a), 29 U.S.C. 207(a)(1) and 29 U.S.C. 216(b). In addition, respondents cite the following:

29 U.S.C. 207(o): (1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

(2) A public agency may provide compensatory time under paragraph (1) only –

(A) pursuant to –

(i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

(ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at

between the employer and employee before the performance of the work; and

(B) if the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed in paragraph (3).

In the case of employees described in clause A(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). Except as provided in the previous sentence, the provision for compensatory time off to such employees for hours worked after April 14, 1986 shall be in accordance with this subsection.

(3)(A) If the work of an employee for which compensatory time may be provided included work in a public safety activity, an emergency response activity, or a seasonal activity, the employee engaged in such work may accrue not more than 240 hours of compensatory time for hours worked after April 15, 1986. Any such employee who, after April 15, 1986, has accrued 480 or 240 hours, as the case may be, of compensatory time off shall, for additional hours worked, be paid overtime compensation.

(B) If compensation is paid to an employee for accrued compensatory time off, such compensation shall be paid at the regular rate earned by the employee at the time the employee receives such payment.

(4) An employee who has accrued compensatory time off authorized to be provided under paragraph (1)

shall, upon termination of employment, be paid for the unused compensatory time at a rate of compensation not less than –

(A) the average regular rate received by such employee during the last 3 years of the employee's employment, or

(B) the final regular rate received by such employee, whichever is higher.

(5) An employee of a public agency which is a state, political subdivision of a State, or an interstate governmental agency –

(A) who has accrued compensatory time off authorized to be provided under paragraph (1), and

(B) who has requested the use of such compensatory time,

shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of compensatory time does not unduely disrupt the operations of the agency.

(6) For purposes of this subsection –

(A) the term "overtime compensation" means the compensation required by subsection (a), and

(B) the terms "compensatory time" and "compensatory time off" mean hours during which an employee is not working, which are not counted as hours worked during the applicable workweek or other work period for purposes of overtime compensation, and for which the employee is compensated at the employee's regular rate.

STATEMENT OF THE CASE

Plaintiffs are 21 current or former corrections officers at the Lansing Correctional Facility in Lansing, Kansas. They brought an action in United States District Court for the District of Kansas against the Department of Corrections of the State of Kansas under the Fair Labor Standards Act, 29 U.S.C. 216(b), alleging violations of 29 U.S.C. 207(a) because of the failure of the petitioner/defendant to pay them overtime wages for a half-hour break period.

Plaintiffs contended that they often did not receive their breaks, that they continued to perform duties during the break period when they received it, that they remained on-call for emergency duty, and that their activities were otherwise so restricted so as to place them predominantly in the service of their employer.

The parties filed separate *Motions for Summary Judgment*, both of which were denied. (App. 7-31), and the case was set for trial. Both sides introduced evidence of a contractual agreement between the Department of Corrections and the bargaining representative of the plaintiffs, A.F.S.C.M.E. Council 64, Local 3371, which required the petitioner/employer to pay overtime pursuant to the Fair Labor Standards Act after the 40th hour of work.

A jury found that the defendant/petitioner had violated the Fair Labor Standards Act and the violation was willful. Petitioner appealed to the United States Court of Appeals for the 10th Circuit on the basis that the District Court had wrongfully admitted evidence that the plaintiffs did not receive their breaks, 10th and 11th Amendment immunity, and that the District Court was in error

for awarding liquidated damages to the plaintiffs on the basis of petitioner's willful violation.

The Court of Appeals affirmed the District Court's decision on all grounds in an opinion entered April 11, 1994. Respondents request the Court deny petitioner's request for Writ of Certiorari based on 10th Amendment immunity for the reasons stated herein.

SUMMARY OF THE ARGUMENT

Respondents contend that the petitioner has provided no reason for the Court to reverse its holding in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 557 (1985) that the governmental/proprietary function test is both unsound and unworkable.

Further respondents contend that the petitioner is in error in alleging that there are conflicts between *Garcia* and this Court's subsequent holdings in *New York v. United States*, 112 S. Ct. 2408 (1992) and *Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991). Both cases specifically refused to revisit the Garcia case. *Gregory* at 2403 and *New York* at 2420.

Further, the 10th Amendment is not implicated in this matter because the petitioner Department of Corrections failed to allege that the political process has been inadequate to address the 10th Amendment concerns of the State of Kansas.

The Congress has been diligent in its efforts to provide for the needs of the states in fashioning the Fair Labor Standards Act. As a result, The State of Kansas has

voluntarily adopted the provisions of the Act within its own administrative regulations and statutes.

The Department of Corrections cannot, in good faith, complain about the overtime provisions of the Fair Labor Standards Act because it contracted with respondents to receive overtime wages after 40 hours worked in one week.

REASONS FOR DENYING WRIT OF CERTIORARI

Petitioner is seeking a Writ of Certiorari based upon 10th Amendment immunity to "harmonize" *Garcia v. San Antonio Metropolitan Transit Authority*, 105 S. Ct. 1005 (1985) and *Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991) and *New York v. United States*, 112 S. Ct. 2408 (1992) (petitioner's brief p. 8).

The Court declared in *Garcia* that the "provisions of the FLSA contravened no affirmative limit on Congress' power under the Commerce Clause." *Garcia*, op. cit. at page 1020. The Court in *Gregory* upheld this basic supposition by stating that it was constrained in the consideration of the degree to which it may consider the limits on Congress' powers to regulate under the Commerce Clause as the result of the *Garcia* decision. *Gregory*, op. cit. at p. 2403.

The *Gregory* decision affirmed *Garcia's* declaration at 469 U.S. at 556-557 that the political process was the primary means by which the states are protected from

Congressional overstepping of its powers under the Commerce Clause, *Gregory*, op. cit. at 2403.[1]

The necessity that the states use the political process was reinforced in *South Carolina v. Baker*, 485 U.S. 505, 512 (1988) in which the Court stated that after Garcia, "states must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity."[2]

The effectiveness of the political process following Garcia on behalf of the States is apparent in the concerns expressed by Congress in crafting the 1985 amendments to the Fair Labor Standards Act.[3]

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[1] Justice Brennan in his dissent in *National League of Cities v. Usery*, 426 U.S. 833, 876 (1975) observed that, "Congress is constituted of representatives in both the Senate and House *elected from the states*. . . . Decisions upon the extent of federal intervention under the Commerce Clause in the affairs of the States are in that sense decisions of the States themselves."

[2] Presumably, petitioner would have the Court reverse *Part II of Baker* as well. There the Court stated that where there is no question or allegation that the political process operated defectively, as per the instant case, the 10th Amendment is not implicated. *Baker*, 485 U.S. at 513. Also see *Local 2203 v. West Adams County Fire Protection District*, 877 F.2d 814, 821 n.9 (1989) wherein the 10th Circuit stated that the defendant's failure to allege that it was in any way precluded from participating in the national political process amounts to a tacit confession that the process operated adequately.

[3] The 1985 *Senate Labor and Human Resources Committee Report* stated, in part: At the same time, it is essential that the particular needs and circumstances of the States and their political subdivisions be carefully weighed and fairly accommodated. As the Supreme Court stated in *Garcia*, *"the states occupy a special position in our constitutional system."* Under

Because of the Congress' concern for the needs expressed by the states, provisions were passed which postponed the date upon which the FLSA was once again made applicable to state employees to April 15, 1986. Pub. L. 99-150, 99 Stat. 787 2(c)(1) (1985) 29 U.S.C. 216 historical note. In addition, 29 U.S.C. 207(o), permitting public employers to use compensatory time in lieu of wages, was passed as part of the 1985 amendments.

The exact nature of the Department of Corrections complaint is clouded in light of the effectiveness of the political process and its own actions.

The petitioner contracted with the respondents' bargaining representative, A.F.S.C.M.E. Council 64, Local 3371, to provide overtime wages after 40 hours a week, pursuant to the Fair Labor Standards Act.[4]

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that system, Congress has the responsibility to ensure that federal legislation does not undermine the States' "special position" or "unduly burden the States." In reporting this bill, the Committee seeks to discharge that responsibility and to further the principles of cooperative federalism.

In particular, in the wake of *Garcia*, the States have identified several respects in which they would be injured by immediate application of the FLSA. This legislation responds to these concerns by adjusting certain FLSA principles with respect to employees of states and their political subdivisions and by deferring the effective date of certain provisions of the FLSA insofar as they apply to the States and their political subdivisions. Senate Report (Labor and Human Resources Committee) No. 99-159. October 17, 1985 (to accompany S. 1570 – Fair Labor Standards Act Amendments of 1985) *U.S. Code and Congressional and Administrative News*, 99th Congress, 1st Session, pp. 652-656, 663 (1985).

[4] At trial, both parties entered the contract into evidence, which stated in relevant part, "Employees of the appropriate

The factual scenario in Gregory offers no clearer picture of the exact nature of petitioner's complaint. The issue in that case was whether the mandatory retirement age for judges set by the State of Missouri violated the Age Discrimination in Employment Act (ADEA).

The Court affirmed the application of the Act to state employers, 111 S. Ct. at p. 2404, but held Congress had not clearly indicated its intent to extend the Act's coverage to the Judicial Branch of the State of Missouri. 111 S. Ct. at 2406. Doing so would have abrogated a state constitutional provision defining the basic qualifications required of state judges.

The Court stated that federal statutes should not be interpreted to "upset the usual constitutional balance of federal and state powers" in the absence of a clear statement of Congressional intent to do. 111 S. Ct. at 2401.

Gregory's chief contribution to an understanding of the relationship between the states and the federal government, the "plain statement rule", is not at issue here since the petitioner has not alleged that the respondents were not covered by the Fair Labor Standards Act. Petitioner concedes that the promulgation of said rule was

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unit shall be eligible for overtime compensation pursuant to the Fair Labor Standards Act, as amended, and K.A.R. 1-5-24, after the 40th hour of work in any work period." The contract was entered into pursuant to K.S.A. 75-4321, et seq., the Kansas Public Employer Employee Relations Act (PEERA) which permits state employees, through a recognized employee organization, to negotiate wage levels, including overtime, with their employer. K.S.A. 75-4322(t).

not in fact a 10th Amendment issue. (Petitioner's brief at p. 7)

New York v. United States, 112 S. Ct. 2408 (1992) fails also to shed any light on the allegations of petitioner. Two challenged provisions of the Low-Level Radioactive Waste Policy Act, which regulated states as participants in interstate commerce, subjecting them to the same regulations applicable to private entities, were upheld, but the "take title" provisions of the Act, which required states to promulgate regulations in conformity with the Federal law, was overturned. As the Court explained its opinion in *New York*:

> Most of our recent cases interpreting the Tenth Amendment have concerned the authority of Congress to subject state governments to *generally applicable laws*. . . . This case presents no occasion to apply or revisit the holdings of any of these cases, as this is not a case in which Congress has subjected a state to the same legislation applicable to private parties. . . . While Congress has substantial power to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions.

112 S. Ct. at 2420, 2421.

Both *Gregory* and *New York* are in accord with *Garcia*. *May v. Arkansas Forestry Commission*, 993 F.2d 632, 636 (8th Cir. 1992). The relationship of the Tenth Amendment to the Commerce Clause was summarized in *New York* as follows, "If a power is delegated to Congress in the

Constitution, the 10th Amendment disclaims any reservation of that power to the states," 112 S. Ct. at 2417.

No Circuit or District Court has offered a dissenting voice to *Garcia* in regard to the Tenth Amendment application of the FLSA to the states.[5]

Petitioner seeks to return to the "traditional government function" test which the Garcia Court found to be unworkable."[6] *Garcia* at p. 557. It claims that the State of Kansas has somehow mastered the ability to distinguish between traditional government functions and proprietary functions. That observation, however, runs directly counter to the experience of the court system as reflected in *Garcia*.

Petitioner Department of Corrections seeks to steer the Court backwards to a position it rightly abandoned nearly a decade ago despite the fact the overtime provisions

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[5] Accord *Reich v. State of New York*, 3 F.3d 581, 589-590 (2d Cir. 1993), *cert. denied* 114 S.Ct. 1187 (1994); *Biggs v. Wilson*, 1 F.3d 1537, 1543-1544 (9th Cir. 1993); *May v. Arkansas Forestry Commission*, 993 F.2d 632, 635-636; *Renfro v. City of Emporia*, 948 F.2d 1529 (10th Cir. 1991); *Bratt v. County of Los Angeles*, 912 F.2d 1066, 1068 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 962 (1991).

[6] After examining and comparing the cases post *Usery* that had tried to make the distinction between government and proprietary functions, Justice Blackmun concluded, "We find it difficult, if not impossible, to identify an organizing principle that places each of the cases in the first group one side of the line (government function) and each of the cases in the second group (proprietary function) on the other. *Garcia* at 469 U.S. at 539.

of the FLSA at issue here are consistent with the State of Kansas' own personnel regulations.[7]

Although it's not clear why petitioner seeks to direct the Court back to *Usery*, Kansas' regulatory consistency with the FLSA and its willingness to contract to pay overtime on the same scale the FLSA provides demonstrates why petitioner does not allege that Kansas is impaired in its ability to structure its essential functions as the result of the Act. *Hodel v. Virginia Surface Mining and Recl. Association*, 452 U.S. 264, 287-288 (1981).[8]

Petitioner substitutes the observation that the overtime provision of the FLSA can affect the state's decision where to allocate resources in performing its governmental function. (App. brief p. 9) However, there is no evidence in the record that during the time which the FLSA has been applied to petitioner's employees, that cause has arisen to indicate substantial impediment to

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[7] K.A.R. 1-5-24(a) states that: Except as otherwise provided by the statutes or regulations, employees of the state who are eligible to receive overtime compensation under the Fair Labor Standards Act of 1938, as amended, shall be compensated for overtime as provided by the Act. K.A.R. 1-5-24(b)(1) states in relevant part, "The rate at which any eligible employee is to be compensated for overtime worked shall be one and a half times the employee's regular rate of pay."

[8] The *Hodel* test states: 1) The federal statute must regulate states as states; 2) It must address matters that are indisputably matters of state sovereignty; 3) The state's compliance with the FLSA must directly impair the state's ability to structure integral operations in areas of traditional governmental functions; 4) The relationship of state and federal interests must not be such that the nature of the federal interest – justifies state submission. *Hodel* op. cit. at 287-288.

petitioner's ability to structure its "governmental functions." Nor is there reason indicated in this case to reevaluate the Court's application of the Commerce Clause to state activities.

Justice Blackmun, who a decade earlier had voted with the majority in *Usery*, but reversed himself to deliver the majority opinion in *Garcia*, provided the most concise reason for not reconsidering *Garcia* in this case, "In sum, in *National League of Cities*, the Court tried to repair what did not need repair." *Garcia*, at 105 S. Ct. 1020.

CONCLUSION

Petitioner offers scant justification for its plea to the Court that it revisit and overturn *Garcia*. It has presented no basis for questioning the principle established therein that the states are best protected through the political process, and indeed the attention Congress gave to the concerns of the states in once again making the FLSA applicable to public employees suggests the states have been well served.

Petitioner offers little in the way of additional insight regarding how to correct the fatal defect of the *Usery* decision, i.e., the lack of a valid governing principle that would allow the courts to draw clearly defined, rational distinctions between proprietary and traditional government functions.

Finally, the specific facts of this case are not given to a *Usery/Hodel* analysis. The Fair Labor Standards Act was not an impediment in structuring the operations of the

Department of Corrections. The Act required nothing more of the petitioner than it imposed upon itself.

Respectfully submitted,

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